SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952

No. 643

RALEIGH SPELLER,

Petitioner,

vs.

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONER

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Counsel for Petitioner.

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Respondent

BRIEF OF PETITIONER

Opinons Below

The opinion of the United States District Court for the Eastern District of North Carolina, Raliegh Division, is reported at 99 F. Supp. 92, *sub nom. Speller* v. *Crawford*;[1] the opinion of the Court of Appeals for the Fourth Circuit is reported at 192 F. 2d 477.

Jurisdiction

The judgment of the Court of Appeals, affirming the order and judgment of the District Court vacating the writ of

[1] By order of the Court of Appeals for the Fourth Circuit dated October 13, 1951, Robert A. Allen, the successor to J. P. Crawford as Warden of Central Prison of the State of North Carolina, was substituted as appellee.

habeas corpus theretofore issued by said District Court, dismissing the petition of petitioner for such writ of habeas corpus, and remanding petitioner to the custody of Respondent, the Warden of the Central Prison of the State of North Carolina, wherein petitioner is an inmate of the death house, under senfence of death by asphyxiation, petitioner having previously been indicted, tried and convicted without recommendation of mercy in the Superior Court of Bertie County, North Carolina, by a jury called from Vance County, an adjoining county, for the crime of rape, was rendered and entered on November 5, 1951 (R. 153-156). Petition for writ of certiorari from this Court to the Court of Appeals was thereafter timely made and certiorari was granted by order of this Court on March 10, 1952 (R. 157) (342 U. S. 953).

The jurisdiction of this Court is conferred by Section 1254(1) of Title 28 of the United States Code.

Statutes Involved

1. Section 2241, Title 28, United States Code:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

. . . . .

(c) The writ of habeas corpus shall not extend to a prisoner unless— . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States."

2. Section 2254, Title 28, United States Code:

"Any application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of

a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Statement of Case

Petitioner, a Negro and an inmate of Central Prison of the State of North Carolina, was convicted for the third time of the capital crime of rape at the August, 1949 Term of the Superior Court of Bertie County, North Carolina, on the 5th day of September, 1949. The first indictment upon which petitioner was tried was found at the August, 1947 Term of Bertie County Superior Court by a grand jury; he was tried and convicted under this indictment at the November, 1947 Term of said Court, but upon appeal from said conviction to the Supreme Court of North Carolina, said conviction was reversed (*State* v. *Raleigh Speller*, 229 N. C. 67, 47 S. E. (2d) 537), upon the ground that the said indictment was invalid, because of arbitrary exclusion of Negroes from grand juries in Bertie County on account of race. A second indictment was returned at the August, 1948 Term of Bertie County Superior Court by a grand jury on which appeared two members of the Negro race; the question of the validity of this second indictment has not been raised. At the ensuing November, 1948 Term of said Court, petitioner was tried upon said second indictment and convicted by a jury drawn from Warren County, a county in the same Judicial District as Bertie County, and sentenced to death. Upon appeal from the second conviction

and sentence, the Supreme Court of North Carolina vacated the second conviction and granted petitioner a new trial for the reason that the trial judge refused to give counsel for defense time to investigate the facts and to procure evidence from Warren County in support of a challenge to the array of jurors called from Warren County to try the cause, based upon the ground of systematic exclusion of Negroes from juries in Warren County on account of race (*State* v. *Raleigh Speller*, 230 N. C. 345, 53 S. E. (2d) 294). The third trial of petitioner, the one now questioned, was held at the August, 1949 Term of the same Court; at the outset of said trial, pursuant to motion made by petitioner that a jury be drawn from some county other than Bertie County to sit in said trial, the trial judge ordered that a special venire of one hundred jurors be summoned from Vance County, a county in the same Judicial District as Bertie County, for the purpose of said trial. After entry of a plea of not guilty to the indictment and prior to the empanelling of the jury, petitioner challenged the entire array of special veniremen summoned from Vance County, upon the grounds that the officials of Vance County, whose duty it was to prepare the jury list, arbitrarily, systematically and purposefully discriminated against members of the Negro race in the preparation of the jury box and jury list in said County, solely on account of race. The trial court overruled petitioner's said challenge, and thereafter the jury returned a verdict of guilty without recommendation of mercy, and petitioner was again sentenced to death. From this last judgment and sentence petitioner again appealed to the Supreme Court of North Carolina, and on this appeal the judgment of the trial court was affirmed (*State* v. *Raleigh Speller*, 231 N. C. 549, 57 S. E. (2d) 759).

Upon the affirmation by the Supreme Court of North Carolina of petitioner's third conviction and sentence, petitioner applied to the Supreme Court of the United States

for writ of certiorari to review the decision of the Supreme Court of North Carolina, and on the 9th day of October, 1950, the Supreme Court of the United States denied said application without opinion (*Raleigh Speller, Petitioner*, v. *State of North Carolina*, 71 S. Ct. 18).

Upon the denial of the petition for writ of certiorari by the Supreme Court of the United States, petitioner filed before the United States District Court for the Eastern District of North Carolina a petition for writ of habeas corpus, and said writ issued and an order entered staying the execution of the judgment of the State Court pending hearing. At the outset of the hearing upon the return, the respondent filed a motion to discharge the writ without the taking of evidence, for that, as contended by respondent, the Court was without jurisdiction in the premises. The Court reserved its decision upon the motion and proceeded to the taking of evidence from both the petitioner and respondent. At the conclusion of all the evidence the respondent renewed his motion to dismiss, and said motion was at said time likewise denied and overruled. Thereafter, the trial court filed certain findings of fact and conclusions of law and a memorandum opinion, as appears in the record herein (R. 99-112), sustaining the position of respondent, and thereupon, the writ of *habeas corpus* theretofore issued was discharged. Subsequent thereto, petitioner duly filed notice of appeal and with leave of the Trial Court appealed his cause to the United States Court of Appeals for the Fourth Circuit. This latter appeal was heard on October 12, 1951, and the judgment of the District Court affirmed by decision of the said Court of Appeals on November 9, 1951.

Petitioner thereupon filed with this Court his petition for writ of certiorari and for permission to proceed *in forma pauperis*. The petition was granted, together with leave to proceed *in forma pauperis*. 342 U. S. 953.

Statement of the Facts

The facts touching upon the innocence or guilt of petitioner of the crime charged appear in the Records of the trial of petitioner in the Superior Court of Bertie County, the record of the third trial, upon which the instant proceedings are predicated, being before this Court as a part of the record on appeal. Succinctly stated, the evidence adduced by the State during the three trials of petitioner hereinbefore referred to, tended to show that on Friday night, July 18, 1947, the prosecuting witness, Mrs. Aubrey Davis, a white lady, was preparing to retire around 10:30 P. M. Mr. Davis, her husband, who is deaf, had retired about a half an hour or forty-five minutes prior to that time. Clad in a night gown, step-ins and a pair of slip-on shoes, Mrs. Davis went to the screen door at the end of her back hall, which opened on a back porch, to see if it was locked, and finding the screen door unlocked, and the latch bent so that it would not hook, Mrs. Davis stepped out on the back porch to get a hammer which was lying on a table on the porch, which she used to straighten the latch on the screen door. Stepping back out on the porch to put the hammer back on the table, Mrs. Davis was grabbed by someone whom she described to be a light-complexioned colored man, who suddenly dashed up on the porch from a hiding place in the shadows at the edge of her house. The man clinched Mrs. Davis in his embrace, dragged her from the porch out into the yard a few feet from the porch, and there allegedly assaulted her. Sometime during the course of the assault the prosecutrix lost consciousness. Regaining consciousness after the lapse of an indefinite period of time, the prosecutrix made an alarm to which neighbors and officers of the law allegedly responded. Thereafter, without any description from the prosecuting witness of how her assailant looked, other than her statement that he was a light-

complexioned colored man, the police picked up the petitioner at a little roadside inn, located approximately 600 feet from the scene of the alleged crime, because, as the officers testified, the defendant, who had been drinking, was perspiring (in the month of July) and looked suspicious. Upon trial the petitioner was represented by the State to be the light-complexioned man who committed the alleged crime, and the jury upon this representation and the evidence introduced by the State, convicted petitioner of the crime with which he was charged.

During the first and third trials, petitioner introduced no evidence in his behalf, choosing rather to rely upon what he considered to be the weakness of the State's case and errors in law committed during the course of the trial. In the second trial, however, petitioner introduced evidence, through his own testimony, and that of five other disinterested witnesses, which tended to establish his presence at a place other than that at which the crime herein involved was allegedly committed, and at the time of its alleged commission.

Questions Presented

The instant case is a companion case to two other cases contemporaneously on appeal to this Court from a ruling of the Court of Appeals for the Fourth Circuit and the United States District Court for the Eastern District of North Carolina (*Bennie Daniels and Lloyd Ray Daniels, Petitioners*, v. *Robert A. Allen, Warden, Respondent*; and *Clyde Brown, Petitioner* v. *Robert A. Allen, Warden, Respondent*, and said cases were, for the most part handled as one, particularly in the District Court. The three said cases appeared to the District Court to be cases of first impression, and a consideration of the opinions entered by the said Court in said cases, as well as the opinion of the Court of Appeals, in general, and for the purpose of the instant ap-

peal, in particular, poses the following as the questions before this Court in the appeal of this matter:

> (1) Is the writ of habeas corpus available in a Federal Court to a petitioner imprisoned pursuant to State process, upon the grounds of denial in the State trial of a federal constitutional right, to wit, denial of equal protection of the laws to said petitioner through, arbitrary exclusion of members of petitioner's race from the trial jury, solely on account of race?
>
> (2) Is the writ of habeas corpus available to petitioner under the procedural circumstances which obtain in the instant case?
>
> (3) If said writ is available, do the facts in evidence in the instant case establish, as contended by petitioner, that in his trial he was denied equal protection of the laws, in violation of the Federal Constitution, in the manner set out?

Specification of Error

The Court of Appeals for the Fourth Circuit erred in affirming the judgment of the District Court dismissing the petition for a writ of *habeas corpus* brought to secure petitioner's discharge from the custody of respondent.

Summary of Argument

Petitioner contends that under the law, as it obtains in federal courts and as regards the jurisdiction of federal courts in habeas corpus proceedings, the remedy of habeas corpus is available to him in a federal court in the instant case to secure his discharge from imprisonment pursuant to a judgment of a state court, where his said imprisonment or confinement is in violation of a federally guaranteed right. Petitioner further contends herein that the evidence in the instant case indisputably reveals and establishes that Negroes were and have been over the past fifty years or more intentionally and arbitrarily excluded from and dis-

criminated against in the constitution of grand and petit juries of Vance County, North Carolina, from which County was selected the petit jury which tried and convicted him, and that the said practice resulted in a denial to him of the sort and type of trial required and guaranteed by the federal constitution.

ARGUMENT

The Writ of Habeas Corpus Is Available in a Federal Court to a Petitioner Imprisoned Pursuant to State Process, upon the Grounds of Denial in the State Trial of Federal Constitutional Right, To Wit, Denial of Equal Protection of the Laws to Said Petitioner Through Arbitrary Exclusion of Members of Petitioner's Race from the Trial Jury, Solely on Account of Race.

As heretofore pointed out, the instant case is a companion to two other cases coming from the United States District Court for the Eastern District of North Carolina and contemporaneously before this Court on appeal from the Court of Appeals for the Fourth Circuit, to wit, *Daniels* v. *Allen*, No. 626, October Term, 1951, and *Brown* v. *Allen*, No. 670, October Term, 1951. On the issue of availability of the writ of habeas corpus in a federal court to secure discharge from confinement pursuant to a state judgment, it appears that these three cases involve a common question of law. Counsel in *Daniels* v. *Allen*, No. 626, in which case counsel in the instant case is also one of the counsel for the petitioners in said case, have heretofore filed before this Court a brief containing a detailed statement of the law on this point, and for this reason this issue will not be argued quite so elaborately in the instant brief.

It is apparent from the memorandum opinion entered in the instant case by the District Court that the primary, if not the sole, basis for the Court's discharging the writ of

habeas corpus theretofore granted to petitioner was the Court's conclusion and impression that upon the state of the law, he had no jurisdiction to grant the writ of habeas corpus under circumstances such as those which obtained in this case. Although the Court heard testimony in the instant proceedings on the issues raised, he did so reserving, in effect, a ruling on a motion made by respondent to dismiss the proceedings for lack of jurisdiction in the premises, and thereafter at the conclusion of the trial adopted the position taken by the respondent that under the procedural history of the instant case, the Court did not have jurisdiction to issue a writ of habeas corpus in said matter. Thus, the crucial issue in the instant case appears to be the propriety and correctness of the position taken by the Court with respect to this issue. This section of the instant brief is addressed to this issue. In view of the fact that the instant case is one of three companion cases, as hereinbefore stated, and in view of the further fact that there were common counsel connected with the said cases, much of the law set out in the briefs filed must necessarily be repetitious.

Any discussion of the instances wherein the writ of habeas corpus will issue from a federal court must begin with the applicable statute, Section 2241 of Title 28 of the United States Code. It is therein provided that the writ will extend "to a prisoner . . . in custody in violation of the Constitution or laws or treaties of the United States." [Section 2241(c)(3).] Of this Section Judge Dobie of the Fourth Circuit once wrote:

> "This is the clause of widest general importance . . . It applies to both state and federal custody. Its purpose is to provide a summary remedy in the federal courts to those imprisoned in violation of their rights under the federal constitution, laws, or treaties, and to make these not only the supreme, but also the readily enforceable, law of the land.

"The provision of the Fifth Amendment . . . and the Fourteenth Amendment . . . seem to be the most fruitful sources of this jurisdiction. . . .

"Federal courts can issue *habeas corpus* to release one as well from state as from federal custody. This power is now too clear to admit of serious debate. It has been exercised in countless cases."

Dobie, "Habeas Corpus in the Federal Courts," 13 Virginia Law Rev. 433, 444, 446.

The federal courts were not always thus equipped to implement the constitutional rights contained in the Fourteenth Amendment. For no provision is contained in the Constitution for federal habeas corpus jurisdiction, and that jurisdiction was narrowly circumscribed in our early history. Only after the Civil War did the federal power gain impetus.

". . . the statute of 1867 [14 Stat. 358], designed to enforce the Reconstruction Acts, and to effectuate the warwon liberty of all persons, made two drastic changes in federal habeas corpus. The writ would now be granted for any detention in violation of the Constitution or laws of the United States. In addition to this change in substantive grounds, federal habeas corpus, when invoked on such grounds, was made available to all persons whether in state or federal custody. The Fourteenth Amendment, by assuring freedom from improper state processes, increased the constitutional rights enforceable by habeas corpus."

Note, "The Freedom Writ—The Expanding Use of Habeas Corpus," 61 Harvard Law Rev. 657, 659.

Even after the enactment in 1867 of the predecessor statute to the present Section 2241(c)(3), the power of the federal courts to issue the writ was narrowly construed. The common law rule which confined habeas corpus to the inquiry whether the prisoner was held under final process based upon a judgment or decree of a court of competent

jurisdiction (*Ex Parte Watkins*, 3 Pet. (U. S.) 193, 202), apparently was followed as late as 1895 in dictum in *Andrews v. Swartz*, 156 U. S. 272, although in the earlier case of *Ex parte Neilson*, 131 U. S. 176, this Court held the writ available to attack a judgment rendered by a court of competent jurisdiction where "a constitutional immunity of the defendant was violated" (131 U. S. 183) on the ground that jurisdiction could be lost if the court acted "contrary to an express provision of the Constitution" (i.d.). Whatever the strictures placed upon federal habeas corpus in the early years following 1867, "the law governing its exercise has been continuously broadened since that time by decisions of the Supreme Court." (Peters, "Collateral Attack by Habeas Corpus upon Federal Judgments in Criminal Cases", 23 Washington Law Rev. 87, 89.) As will be seen, this Court has completely discarded the old common law limitations upon habeas corpus, and the writ is now available, as the statute requires, where conviction is "in violation of the Constitution or laws or treaties of the United States." As stated by the Chief Judge of the Fourth Circuit, the rule at present is that:

> "There is preserved in full the right of persons imprisoned under judgments of state and federal courts to ask release on the grounds that they have been denied the sort of trial guaranteed by the Constitution . . ."
>
> Parker, "Limiting the Abuse of Habeas Corpus," 8 F. R. D. 171, 178. See also Note, "The Writ of Habeas Corpus in the Federal Courts," 35 Columbia Law Rev. 404.

A full review of this Court's decisions developing and expanding the scope and function of federal habeas corpus jurisdiction is set out as *Hawk v. Olsen*, 326 U. S. 271, 274-276, and with the indulgence of the Court that discussion is quoted here at length because it summarizes more succinctly

than could petitioner the history of federal habeas corpus jurisdiction.

"Since Frank v. Mangum, 237 U. S. 309, 331, 59 L. Ed. 969, 981, 35 S. Ct. 582, this Court has recognized that habeas corpus in the Federal courts by one convicted of a criminal offense is a proper procedure 'to safeguard the liberty of all persons within the jurisdictions of the United States against infringement through any violation of the Constitution,' even though the events which were alleged to infringe did not appear upon the face of the record of his conviction. This opportunity for an examination into the 'very truth and substance of the causes of his detention' was said in the Frank case to have come from the adoption in 1867 [February 5] of a statute which empowered Federal courts to examine into restraints of liberty in violation of the Constitution of the United States. 14 Stat. 385, c. 28. The legislation enlarged for the Federal courts the 'bare legal review' of the authority under which a petitioner was held which had been previously afforded by habeas corpus. Johnston v. Zerbst, 304 US 458, 465-467, 82 L. Ed. 1461, 1468, 58 S. Ct. 1019, 146 ALR 357. See also Re Neagle (Cunningham v. Neagle), 135 US 1, 69-76, 34 L. Ed. 55, 73-76, 10 S. Ct. 658; MacNally v. Hill, 293 US 131, 79 L. Ed. 238, 55 S. Ct. 24.

This liberalization of habeas corpus required Federal courts when the issue was presented, to examine whether a conviction occurred under such influence by mob spirit as to deny due process, Frank v. Mangum, supra (237 US 331, 335, dissent 347, 59 L. Ed. 981, 983, 988, 35 S. Ct. 582). The power was called into play a few years later to examine a state conviction under alleged community coercion and this Court said that if the facts set out were true, that the trial would not support conviction. Moore v. Dempsey, 261 US 86, 67 L. Ed. 543, 43 S. Ct. 265. In Mooney v. Holohan, 294 US 103, 112, 79 L. Ed. 791, 794, 55 S. Ct. 340, 98 ALR 406, it was declared that the knowing use of material perjured testimony by a state prosecutor would make a trial unfair within the meaning of the Fourteenth Amendment.

When the absence of counsel at a trial was urged as a ground for a Federal writ of habeas corpus, we held that in Federal courts a felony conviction without benefit of counsel is subject to collateral attack because a violation of the accused's constitutional right to the service of an attorney unless he has intelligently waived that privilege. Johnston v. Zerbst, supra; Walker v. Johnson, 312 US 275. The same is true in instance of coercion. Waley v. Johnston, 316 US 101.

In state prosecutions a conviction on a plea of guilty, obtained by a trick, Smith v. O'Grady, 312 US 329, or, after refusal of a proper request for counsel, because of the accused's incapability adequately to defend himself, Williams v. Kaiser, 323 US 471, 472, will not support imprisonment. Such procedure violates the Fourteenth Amendment to the Constitution. See Tompkins v. Missouri, 323 US 485; Cochran v. Kansas, 316 US 255. That Amendment is violated also when a defendant is forced by a state to trial in such a way as to deprive him of the effective assistance of counsel. Powell v. Alabama, supra; House v. Mayo, 324 US 42. Compare Ex Parte Hawk, supra, 321 US 114; Glasser v. United States, 315 US 60, 69, 70."

It will be particularly noted that in all of the foregoing cases discussed in *Hawk* v. *Olsen*, *supra*, that it was considered that habeas corpus would issue even though attacking collaterally the judgment of a court of competent jurisdiction. The appropriate inquiry is not whether the court whose judgment is thus reviewed is one of competent jurisdiction, but whether a constitutional safeguard, fundamental and basic to a fair trial has been trespassed.

". . . if it be found that the court has no jurisdiction to try the petitioner, or that in its proceeding his constitutional rights have been denied, the remedy of habeas corpus is available." *Howen* v. *Johnson*, 306 U. S. 19, 24 (Hughes, C. J.).

". . . the use of the writ in the federal courts to contest the validity of a conviction for crime is not re-

stricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused . . ."

". . . the writ is available when the petitioner has exhausted his state remedies, and . . . he makes a substantial showing of a denial of a federal right." *Ex parte Hawke*, 321 U. S. 114, 118.

". . . the Court no longer fictionalizes in an effort to conform situations to the terms of an outmoded precept of jurisdiction, but squarely attacks the constitutional points in issue as such." Note, 61 Harvard Law Rev. 657, 661.

In a thorough and systematic review of the principles of federal habeas corpus, the District of Columbia Court of Appeals declared in *Dorsey* v. *Gill*, 148 F. 2d 857, 871-2, cert. den. 325 U. S. 890, that the petitioner can attack a judgment of conviction collaterally "by showing either that the court had no jurisdiction to try the petitioner, or that during its proceeding his constitutional rights were so far denied that the court lost jurisdiction."

The appropriate inquiry is, therefore, whether the judgment attacked collaterally by federal habeas corpus is "such a gross violation of constitutional right as to deny to the petitioner the substance of a fair trial."

The jury questions raised upon the instant proceeding are clearly the subject of inquiry on federal habeas corpus, for the constitution of the grand and petit juries are matters which go to jurisdiction in its most literal sense. One commentator has therefore concluded with respect to the right to challenge juries from which Negroes have been excluded:

"If the defendant did not waive his right by failing to assert it at his trial, then it would always be available to him, even by a later application for a writ of habeas corpus." Peters, *op. cit. supra*, at 93.

This conclusion is warranted by the decisions of this Court which hold that the denial to a Negro defendant of his right to a selection of grand and petit jurors without discrimination against his race, would be a violation of the Constitution and laws of the United States." *Delaware* v. *Neal*, 103 U. S. 370, 394; *Ex parte Virginia*, 100 U. S. 313, 322-3; *Strauder* v. *West Virginia*, 100 U. S. 303; *Bush* v. *Kentucky*, 107 U. S. 110, 119; *Norris* v. *Alabama*, 294 U. S. 587, 589; *Hale* v. *Kentucky*, 303 U. S. 613; *Pierre* v. *Louisiana*, 306 U. S. 354, 361; *Hill* v. *Texas*, 316 U. S. 400, 406. This Court demonstrated its appraisal of the consequence of Negro exclusion from juries even more forcefully in *Smith* v. *Texas*, 311 U. S. 128, 130, when it declared:

> "For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."

Racial discrimination in the selection of jurors is, so far as this Court is concerned, the type of "gross violation of constitutional right" which founds the remedy of federal habeas corpus. In fact, in *Moore* v. *Dempsey*, *supra*, one of the factors which rendered the state proceeding a nullity and vulnerable to habeas corpus in the federal courts was, according to Mr. Justice Holmes, the deliberate exclusion of Negroes from the grand and petit juries in that case.

It is true that in *Andrews* v. *Swartz*, *supra*, this Court, by way of an alternative holding which was in the nature of dicta, treated the foregoing jury question as one which could not be raised by federal habeas corpus. But, as has already been indicated, that early case was premised on the obsolete and rejected notion that federal habeas corpus will not issue to attack the judgment of a state court of competent jurisdiction—a notion so thoroughly in conflict

with the line of cases following *Frank* v. *Mangum*, *supra*, that it was recently remarked of *Andrews* v. *Swartz* that "it is doubtful if the cited cases retain full authority today in view of *Johnston* v. *Zerbst* . . . ; wherein the Supreme Court held that a trial court would lose jurisdiction, i. e., the power, to try a criminal indictment, if the defendant was denied his constitutional right to assistance of counsel under the Sixth Amendment." *International Longshoremen's & Warehousemen's Union, et al.*, v. *Ackerman et al.*, 82 F. Supp. 65, 116 (D. Haw., Biggs J.). More in accord with the now prevailing view of the function of the federal writ are those recent cases where it was assumed that, if properly raised and preserved, exclusion of Negroes from juries in a state prosecution would be a matter for review in the federal courts by habeas corpus. *Carruthers* v. *Reed*, 102 F. 2d 933 (C. A. 8), cert. den. 307 U. S. 643; *Johnson* v. *Sanford*, 167 F. 2d 738 (C. A. 5); see also *Burroughs* v. *Sanford*, 52 F. Supp. 919 (N. D. Ga.).

II

The Writ of Habeas Corpus Is Available to Petitioner under the Procedural Circumstances Which Obtain in the Instant Case.

In the 1948 recodification of the Judicial Code, statutory limitations were imposed upon federal habeas corpus proceedings wherein a judgment of conviction of a state court is attacked collaterally. Act of June 25, 1948, c. 646, Section 1, 62 Stat. 967. Those limitations appear in Section 2254 of Title 28 which provides:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence

of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, by any reasonable procedure, the question presented."

It cannot be denied that under the laws of the State of North Carolina and the decision of this Court in *Darr* v. *Burford*, 339 U. S. 200, 70 S. Ct. 587, that petitioner has within the meaning of the foregoing section "exhausted the remedies available in the courts of the State." Following his conviction in the Superior Court of Bertie County, petitioner's case went to the Supreme Court of North Carolina in orderly appeal (Gen. Stat. of North Carolina, 1943, Sec. 1-270). Upon affirmance of the sentence of the Superior Court by the Supreme Court of North Carolina, petitioner applied to this Court for writ of certiorari, which was denied without opinion (*Raleigh Speller, Petitioner,* v. *State of North Carolina*, 71 S. Ct. 18). In cases like the instant case, the State of North Carolina does not make available the writ of habeas corpus. Section 17-4 of the General Statutes of North Carolina (1943) specifies:

"Application to prosecute the writ shall be denied in the following cases: . . . .

"2. Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment, or decree."

It will be noted that the statute does not merely require that the writ be denied in the cited circumstances, but that the application to prosecute the writ shall be denied, and the Supreme Court of North Carolina has so construed it.

In re Taylor, 229 N. C. 297, 49 S. E. (2d) 749; *Howie* v. *Spittle*, 156 N. C. 180, 72 S. E. 207; *In re Holley*, 154 N. C. 163, 69 S. E. 872.

In view of the position taken by the District Court and the great probability that the procedural history of the instant case may have been of overbalancing significance in the conclusion reached by the Court, it may well be queried, for purpose of answer herein, whether the procedural history of petitioner's case could or should have had any bearing upon the merits of the case in the instant habeas corpus proceeding. It is to this query that the immediately following paragraphs will be addressed.

This question seems to be the offspring of the confusion which is said to exist with respect to the issue posed, namely, the effect of the denial of certiorari by this Court where application therefor is made subsequent to a denial of relief by the state court. Before undertaking a discussion of what this Court itself has said that a denial by it of certiorari imports, or, rather, does not import, it may be well to set out two possible different procedural situations in connection with which the question may be posed for the purpose of evaluating the confusion which is said to exist. First, there is the situation, as in the instant case, where this Court denies certiorari upon application for such writ after an orderly and normal appeal to the State Supreme Court has been taken; secondly, there is the situation where this Court denied certiorari sought after a denial by the state court of a petition for writ of habeas corpus, where orderly state appeal procedure has theretofore been likewise followed. Thus, it may be queried, conceding for the purpose that the denial of certiorari may have some significance, whether the denial of certiorari in the instance of application for such writ following a simple, orderly appeal to a state court, has the same effect and significance as the denial of certiorari in the instance upon application for

such a writ from a denial of a state of a petition for habeas corpus. It appears that in the cases in which there has been some intimation that a district court might be to some extent influenced by denial of certiorari, that the denial of certiorari was in instances of the second type hereinbefore referred to, namely, where there was an application for habeas corpus. See *White* v. *Ragen*, 324 U. S. 760; *Ex parte Hawke*, 321 U. S. 114. However, no case of the procedural comparison of the instant case has been found in which it has been even intimated that the denial of certiorari by this Court upon application therefor following denial of relief by the state court upon a normal, orderly appeal, imports any opinion by this Court upon the merits of the case involved; as a matter of fact, in an unwavering line of decision, in which occasion has been had to discuss the matter, this Court has unmistakably and impatiently expressed the contrary. *State of Maryland* v. *Baltimore Radio Show*, 70 S. Ct. 252; *Darr* v. *Burford*, 339 U. S. 200; *Agoston* v. *Commonwealth of Pennsylvania*, 71 S. Ct. 9; *House* v. *Mayo*, 324 U. S. 42. In *State of Maryland* v. *Baltimore Radio Show*, *supra*, after going into great detail as to why the denial of certiorari by this Court imports nothing with respect to the merits of a given case, Mr. Justice Frankfurter said, at 255:

> "Inasmuch, therefore, as all that a denial of a petition for writ of certiorari means is that fewer than four members of the court thought it should be granted, this court has vigorously insisted that such a denial carries with it no implication whatever regarding the court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated."

Although, as was hereinbefore said in attempting to distinguish two possible procedural situations, a few of the cases appear to intimate that a denial of certiorari after the denial by a state court of a petition for habeas corpus may be ac-

cepted by the district court as being of some weight in a subsequent application for habeas corpus in a district court, this Court appeared to dispel even this possible interpretation of such cases in *House* v. *Mayo, supra.* In the *House* case, the petitioner had been convicted by the state trial court; on appeal to the Florida Supreme Court his conviction was affirmed; subsequently he filed several petitions for habeas corpus in the state supreme court, which were denied; from the denial of one of said petitions for habeas corpus by the Florida Supreme Court, he applied for certiorari to this Court, which application was also denied. In reversing the district court and the circuit court of appeals for refusing to entertain petitioner's application for writ of habeas corpus, this Court said, at 47-48:

> "The district court also referred to a denial by this Court of a petition for certiorari, filed here after denial by the Florida Supreme Court of one of the applications for habeas corpus. See House vs. Mayo, 322 U. S. 710, 88 L. Ed. 1553, 64 S. Ct. 1058. The district court thought that this was an expression 'of the opinion that no meritorious question is presented by the matters of which petitioner here complains.' But as we have often said, a denial of certiorari by this court imports no expression of opinion upon the merits of a case (citing decisions)."

It would seem to be anomaly to say that petitioner must apply, as part of exhaustion of state remedies, for certiorari to this Court before seeking habeas corpus in a district court and, at the same time, say that, if his application for certiorari is denied, such denial is an importation by this Court that petitioner's case lacks sufficient merit so that a petition for habeas corpus need not be entertained by the district court, for such a state of affairs would compel petitioner to resort to an undertaking which would in effect withdraw from him his only opportunity for federal review of federal

rights claimed. It would appear that the expansion of federal jurisdiction in habeas corpus was designed to insure that a petitioner who claims violation of federal rights would at some stage of proceedings involving him have unequivocal federal review of his case on the merits thereof. See Dobie, *Habeas Corpus in the Federal Courts*, 13 Virginia Law Rev. 433, 444, 446; Note, *The Freedom Writ—The Expanding Use of Habeas Corpus*, 61 Harvard Law Rev. 657, 659. In his article entitled "*Limiting the Abuse of Habeas Corpus*," 8 FRD 171, 178, Parker, Chief Justice of the Fourth Circuit, after referring to some of the abuses designed to be eliminated by the revision of federal habeas corpus jurisdiction, none of which, it may be pointed out, obtains in the instant case, said:

> "There is preserved in full the right of persons imprisoned under judgments of state and federal courts to ask release on the grounds that they have been denied the sort of trial guaranteed by the Constitution . . . ."

In the final analysis, the law and statements of the law herein set out, as applied to the instant case, warrant, it is submitted, the conclusion that the fact that this Court denied petitioner's application for certiorari following an appeal to the North Carolina Supreme Court imports nothing with respect to this Court's opinion of the merits of petitioner's case, in no wise withdraws from a federal court the jurisdiction to consider his case upon the merits, nor substantiated the District Court's and Court of Appeals' refusal to entertain his case upon the merits thereof.

III

The Facts in Evidence in the Instant Case Establish That Petitioner Was Denied Equal Protection of the Laws in His Trial in the State Court, in Violation of the Federal Constitution Through Arbitrary Exclusion of Negroes from Juries in Vance County Solely on Account of Race.

Little doubt can exist upon the instant record, it is submitted, that over the years Negroes have been purposefully excluded from juries in Vance County, solely for reasons of race. The record reveals that although Negroes comprised 42.4% of the total population of Vance County 21 years of age and over (R. 88), and approximately 38% of the taxpayers appearing on the 1948 tax list, a similar proportion having presumably existed in prior years, up to and including the trial of petitioner (R. 88, 98), it is undisputed that within the memory of witnesses fifty years of age and over no Negro had ever served on a grand or petit jury in Vance County (R. 40-41, 56, 64, 72, 76, 81-82). It is inconceivable in the present state of the law and known facts that this situation is the result of anything other than a studied and purposeful plan of denying to Negroes representation on Vance County juries, solely on grounds of race.

It is clearly apparent from the instant record that two reasons in particular have contributed to the absence of Negroes from juries in Vance County; First, the small percentage of Negroes on the jury list compiled by the jury commissioners (R. 89, 97-98); and, second, a system of marking scrolls containing the names of Negroes so that even those few placed on the jury list and in the jury box may be passed over in the actual selection of a jury (R. 66-68, 69, 72-73, 78, 79).

According to inquiry made and stipulation of Counsel, the jury box of Vance County, from which was drawn the jury which convicted petitioner, contained the names of 2,126

persons, of whom only 145 persons were Negroes (R. 89, 97-98). Negroes, therefore, although comprising 42% of the adult population and 38% of the taxpayers, as aforesaid, constituted only about 6% of the Vance County jury list, with none of this six per cent having ever served on a jury in Vance County. It is apparent that either no thought was given to the inclusion of Negroes on jury lists in Vance County, as required by law, or the exclusion of Negroes from such juries was purposeful, either of which situations has resulted in infraction of rights guaranteed by the Federal Constitution. The evidence in the instant record reveals that H. M. Robinson, Clerk to the jury commissioners for eighteen years or more, prepared the jury lists in Vance County, including the one from which the jury was drawn which convicted petitioner, without being given any guiding instructions by the jury commissioners, upon whom the law imposed the primary duty and responsibility of seeing to it that jury lists in Vance County were properly constituted (R. 38, 53-55, 61, 63-64, 65, 67, 71, 74, 75, 79). It is further apparent from the record that although the 1948 tax list, from which the jury list involved in the instant proceeding was prepared, contained the names of approximately 8,000 names, 3,000 of whom were Negroes, the said H. M. Robinson arbitrarily and, as he testified, without any basis or criteria, selected the names of only 2,126 persons, including therein the names of only 145 Negroes (R. 36-38, 48-50, 51-55, 98). In the face of such overwhelming evidence of discrimination, the denial by the jury commissioners of any intent to discriminate is unavailing, for otherwise the Fourteenth Amendment would be "but a vain and illusory requirement." *Norris* v. *Alabama*, 294 U. S. 587, 598.

That exclusion of Negroes from juries solely because of race deprives a Negro defendant of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution, is so well established that cita-

tion of authority is hardly required. In addition to the discrimination made out by the history of service of Negroes on juries in Vance County, and the statistics and percentages prepared and compiled during the instant hearing (R. 88), it is apparent that yet another basis exists to taint fatally the jury system in Vance County, of which the petitioner herein complains. The jury commissioners of Vance County, in addition to abandoning the preparation of jury lists to the sole and arbitrary discretion of the Clerk to the board, in going over the list prepared by the Clerk uniformly rejected as jurors persons whom they did not personally know (R. 63, 66, 71). Moreover, although said commissioners admittedly had knowledge of only a portion, and sometimes, a very small portion, of the persons whose names were placed on the jury lists, they made no investigation to ascertain the qualifications of persons whom they did not personally know (R. 63, 66, 75-76); at no time did any of the members of the jury commission consult with persons in the Negro community to ascertain qualifications for service as jurors in Vance County of Negroes who possessed the necessary moral and intelligence qualifications (R. 63, 66, 71, 75-76). *Cassell* v. *Texas*, 339 U. S. 282, 287-289, and *Ward* v. *Texas*, 316 U. S. 400, 404, give undisputed authority to the proposition that such behavior is fatal to a claim of lack of discrimination.

Although much weight was placed by the respondent upon the alleged purge of the Vance County jury box in July, 1949, this purge was no different from purges over past years, for the jury commissioners testified during petitioner's trial in the Bertie County Superior Court that the names of Negroes have always been in the jury box.[2] The result is that the jury box in Vance County

[2] Record of Trial in Superior Court of Bertie County, North Carolina, pages 17, 33-34, 42, which Record is an Exhibit in the instant proceeding.

was constituted in July, 1948, just as it was in prior years, and in a manner which discriminated against Negroes, as hereinbefore set out. The exclusion of even the few Negroes whose names have appeared in the jury box over the years, was achieved by the commissioners through the placing of an identifying mark on the scrolls that contained the names of Negroes. Although the commissioners denied the purpose of the marking, there could be no doubt that the same was for the purpose of and was used in conjunction with the other means used to exclude Negroes from Vance County juries. As this Court said, in *Smith* v. *Texas*, 311 U. S. 128, 132, the federal constitution outlaws jury discrimination whether they are accomplished "ingeniously or ingenuously."

Conclusion

Petitioner submits, therefore, that on the law and facts herein obtaining, the District Court was in error in denying his petition for writ of *habeas corpus*, and the Court of Appeals was in error in affirming said ruling, and that, therefore, the rulings of said Courts should be reversed.

Respectfully submitted,

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